

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**TERRY L. MCILVOY,
APPELLANT**

vs.

**JAMES SHARP, ET AL.,
RESPONDENT**

DOCKET NUMBER WD78822

DATE: FEBRUARY 9, 2016

Appeal from:

The Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Judge

Appellate Judges:

Before Division Three: Joseph M. Ellis, P.J., Karen King Mitchell, J. and Gary D. Witt, J.

Attorneys:

Terry L. McIlvoy, Appellant Acting Pro-se

Emily A. Wales, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS WESTERN DISTRICT

TERRY L. MCILVOY, APPELLANT

v.

JAMES SHARP, ET AL., RESPONDENTS

WD78822

Pettis County, Missouri

Before Division Three Judges: Joseph M. Ellis, P.J., Karen King Mitchell, J., and Gary D. Witt, J.

Terry McIlvoy appeals from a judgment entered in the Circuit Court of Cole County dismissing his *pro se* petition asserting § 1983 claims against assorted government employees and agencies related to his treatment while incarcerated. Appellant is incarcerated in the Jefferson City Correctional Center ("JCCC"). In 2013, Appellant worked in a furniture factory at JCCC operated by Missouri Vocational Enterprises ("MVE"). On November 11, 2013, Appellant was involved in a confrontation with James Sharp, a supervisor employed by MVE, after Appellant had failed to turn off a machine before performing repairs on it.

Subsequently, Appellant, acting *pro se*, filed his "Complaint Under the Civil Rights Act U.S.C. § 1983" against Sharp, JCCC, and MVE. He also named as defendants Nick Miller, an investigator for JCCC; James Hess, an administrative investigator for JCCC; and Amy Roderick, Inspector General for the Department of Corrections. Appellant generally claimed that Sharp assaulted him by hitting him in the head three times with his fist, that he had been retaliated against for filing a grievance regarding that assault, that his complaint was not properly investigated, that Sharp had tampered with witnesses, and that all of the individual defendants had deliberately tried to cover up the incident.

AFFIRMED.

Division Three holds:

- (1) The trial court's granting of the motion to dismiss the claims against JCCC, MVE, Roderick, Miller, and Hess, as well as its decision to enter summary judgment in favor of Sharp, are determinations that this Court reviews *de novo* and that we must affirm if properly entered for any of the reasons set forth in those motions.
- (2) Since he failed to plead facts giving rise to an exception to sovereign immunity, Appellant did not state a claim for which relief could be granted

against JCCC or MVE, and the trial court properly dismissed his claims against them.

- (3) To state a § 1983 claim, a plaintiff must allege facts supporting any individual defendant's personal involvement or responsibility for the violations. Assertions of bare, conclusory allegations are not sufficient to state a claim.
- (4) Because Appellant's petition did not allege facts establishing that Roderick, Miller, or Hess were personally involved in or responsible for any deprivation of his rights, he failed to state a cause of action against them. Accordingly, the trial court did not err in dismissing Appellant's claims against those defendants.
- (5) Not every malevolent touch by a prison employee violates a prisoner's constitutional rights and gives rise to an action under § 1983. The prohibition on cruel and unusual punishments necessarily excludes from constitutional recognition *de minimus* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind. An inmate who complains of a 'push or shove' that causes no discernible injury almost certainly fails to state a valid excessive force claim.
- (6) In the case at bar, Appellant claimed in his petition that Sharp hit him on the head three times with his fist as though he was "knocking on a door." Appellant did not aver in his petition or in response to the motion for summary judgment that he suffered any injury or experienced significant pain as a result of Sharp hitting him on the head, and he expressly stated in his petition that no medical treatment was involved in his claims. The physical contact alleged to have occurred is simply not sufficient to rise to the level of a violation of Appellant's constitutional rights. Accordingly, the trial court did not err in entering summary judgment in favor of Sharp on Appellant's § 1983 excessive force claim.
- (7) Appellant's allegations against Sharp related to witness tampering were conclusory and failed to indicate how his rights were violated or he was damaged thereby.
- (8) With regard to Appellant's retaliation claim against Sharp, Appellant failed to support his denials of the uncontroverted facts asserted in the motion for summary judgment with reference to any discovery, exhibits, or affidavits. Since Appellant's denials were not properly supported, Sharp's statements of uncontroverted facts must be deemed admitted. As the uncontroverted facts establish that Sharp was not involved in the allegedly retaliatory acts, the trial court did not err in entering summary judgment on that claim.

- (9) Based upon the uncontroverted fact that Sharp was not responsible in any way for investigating Appellant's complaint, the trial court properly entered summary judgment in Sharp's favor on Appellant's § 1983 claims against him related to how the investigation was conducted.
- (10) The mere fact that the trial court granted all of the State's motions and denied all of Appellant's motions does not, in and of itself, establish bias or prejudice on the part of the trial court.
- (11) Appellant's point and argument related to discovery have not been developed sufficiently to allow for meaningful appellate review since Appellant failed to identify the appropriate standard of review, to identify specific rulings of the trial court being challenged, or to offer any legal argument as to why the court's rulings were erroneous.

Opinion by: Joseph M. Ellis, Judge

Date: February 9, 2016

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